

**PLAINTIFFS'
OPPOSITION TO
GOOGLE'S MOTION
FOR SUMMARY
JUDGMENT**

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NORTHERN DISTRICT OF CALIFORNIA

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and MONIQUE TRUJILLO individually and on
behalf of all other similarly situated.

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V.

GOOGLE LLC,

Defendant.

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Case No. : 4:20-cv-03664-YGR-SVK

PLAINTIFFS' OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Yvonne Gonzalez Rogers
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1 **I. INTRODUCTION**

2 Google's own employees described Incognito—its supposedly “private” browsing mode—
 3 as “***a problem of professional ethics and basic honesty.***” PAF12. Google's Motion ignores this
 4 damning evidence, arguing that it is entitled to summary judgment on all claims because its
 5 disclosures “mak[e] clear” that Google collects and uses private browsing data. Mot. at 11. To win,
 6 Google must prove that “no reasonable jury could find” otherwise. *Calhoun v. Google, LLC*, 2022
 7 WL 18107184, at *7 (N.D. Cal. Dec. 12, 2022) (Gonzalez Rogers, J.). Google cannot begin to bear
 8 the weight of that heavy burden—especially when Google's own employees admit that Incognito is
 9 “***effectively a lie.***” PAF12.

10 Google's legal arguments fare no better. The Court has twice rejected Google's principal
 11 argument—raised here for the third time—that “Google's Privacy Policy . . . expressly disclosed the
 12 challenged data collection and use.” Mot. at 1. To the contrary, based on the form contract (which
 13 includes the Privacy Policy) users “***could easily conclude that Google promised Plaintiffs that***
 14 ***using 'private browsing mode' would prevent Google from collecting Plaintiffs' data.***” Dkt. 363
 15 (Order Denying MTD SAC) at 21 (citing Dkt. 113 (Order denying MTD FAC)). Rather than
 16 acknowledge or distinguish the Court's prior orders, Google's Motion simply ignores them.

17 The prior orders were right, as Plaintiffs have uncovered scores of evidence where Google's
 18 own employees denounced Google's collection and use of private browsing data, thus agreeing with
 19 Plaintiffs' (and the prior orders') interpretation of Google's disclosures. For example:

- 20 • Google employees acknowledged that Google “***must enter a contract with the user***
 regarding what happens when they enter Incognito mode,” where one of Google's
 “[***k***ey promises” was “***don't collect data from the Incognito session.***” PAF20.
- 21 • Google did not “actually deliver[] on the ***promise of being private***” because Incognito is
 “***not private in the ways that many users want, that is, as to Google***”; Google needed to
 be more “honest” and “clear that Incognito is intended for local device privacy.” PAF20.
- 22 • Changes were needed to stop “***deceiving*** users,” including to address the “***common***
 misconception” that “***private mode***” “***hides browsing activity from Google***,” where
 users' misconceptions “flow directly” from Google's representations. PAF7, 9, 12.
- 23 • There was an internal push to “rename” and “rebrand” Incognito and to change Google's
 disclosures, particularly to add “Google” to the Splash Screen to clarify that “***You are***
 NOT protected from Google” and to remove “***the word 'private,'***” which poses “***the risk***
 of overestimating the protection Incognito offers.” PAF13, 21.

- 1 • Recognition of what Google internally called the “***Incognito Problem***” made its way to
2 Google’s top executives, with one complaining to Google CEO Sundar Pichai that
3 Incognito is “***not truly private.***” PAF19, 20.
- 4 • But Google never made any of these changes. CEO Pichai decided that he “***didn’t want***
5 ***to put incognito under the spotlight,***” and Google prohibited employees from
6 “***launch[ing]*** anything that negatively impacts revenue” because “***[u]ser benefit alone is***
7 ***not sufficient justification for a revenue loss.***” PAF22.
- 8 • Google instead continued collecting private browsing data “***without consent,***” deceiving
9 (according to its own counsel) at least [REDACTED] PAF10, 11.

10 Backed into a corner, Google resorts to rewriting the law, arguing that its misappropriation
11 of private browsing data is excused because the data is supposedly “unidentified.” Mot. at 9, 23.
12 There are many problems with this argument. First, it is not the law. The right to privacy is not
13 limited to only “identified” data. But second, even if it were, a jury could find that this data *is*
14 identifying, particularly where Google’s own Motion concedes that it is “keyed by (i.e., ***associated***
15 ***with) unique identifiers,***” and, as a result of the sanctions orders, Plaintiffs have learned that Google
16 stores private browsing data alongside regular browsing data in the same exact log. PAF4. Against
17 that backdrop, it is no wonder Google employees admit that “***we would never say] that Google***
18 ***doesn’t know who you are while you’re Incognito.***” PAF24.

19 The Court’s earlier rulings, and the evidence revealed since then through years of tireless
20 fact and expert discovery, raise at least a triable issue of fact on Google’s claim that the contract
21 “expressly disclosed” the at-issue conduct. Summary judgment is unwarranted because “a
22 reasonable jury could find that [Google’s] Privacy Policy provisions . . . do not obtain knowing
23 consent for” these practices. *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1074 (N.D. Cal. 2016).
24 For these reasons and the reasons below, all claims should proceed to trial in November.

25 II. ARGUMENT

26 A. TriaBLE ISSUES AS TO ARTICLE III STANDING.

27 Google’s standing challenge fails because there is at least a triable issue as to whether Google
28 had express permission to collect users’ private browsing data. Google’s Motion concedes as much,
 arguing that Plaintiffs lack standing because they cannot “overcome Google’s ***accurate*** disclosures.”
 Mot. at 1. The implication of Google’s argument is that, if a jury agrees with Plaintiffs’ interpretation
 of the disclosures, then Plaintiffs have met their burden. At best, Google’s argument, which turns on

1 its interpretation of the contract, raises “disputed facts” that “preclude[]” summary judgment. *Cal.*
 2 *v. Ross*, 362 F. Supp. 3d 749, 755-56 (N.D. Cal. 2018).

3 In a slight twist on the same argument, Google suggests that Plaintiffs must prove that
 4 Google “links the at-issue data to their identities.” Mot. at 10. But Google already made this
 5 argument in *In re Google Referrer Header*, and the court correctly rejected it. 465 F. Supp. 3d 999,
 6 1009-10 (N.D. Cal. 2020). “[I]nformation need not be personally identifying to be private.” *Id.* By
 7 way of analogy, a shopper who was filmed changing in a dressing room would have standing to sue
 8 for invasion of privacy even if the store blurred out her face.

9 The unauthorized intrusion is the violation that creates standing to sue regardless of
 10 identification or further harm. “[A] concrete injury for Article III standing purposes occurs when
 11 Google . . . tracks a person’s internet browser activity without authorization.” *Campbell v. Facebook,*
 12 *Inc.*, 951 F.3d 1106, 1119 (9th Cir. 2020). The Wiretap Act and CIPA “codify a substantive right to
 13 privacy, the violation of which gives rise to a concrete injury sufficient to confer standing.” *In re*
 14 *Facebook, Inc. Internet Tracking*, 956 F.3d 589, 598 (9th Cir. 2020). These statutes “bear a close
 15 relationship to traditional privacy torts such as unreasonable intrusion upon seclusion,” *Referrer*
 16 *Header*, 465 F. Supp. 3d at 1010, which is a “harm[] traditionally recognized as providing a basis
 17 for lawsuits in American courts,” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2197, 2204 (2021).
 18 Similarly, “[t]he failure to perform a duty required by contract is a legal wrong, independently of
 19 actual damage sustained.” *Kenyon v. W. Union Tel. Co.*, 100 Cal. 454, 458 (1893). Mot. at 10.¹

20 Even if standing turned on whether the data is identifying (which is not the law), the Motion
 21 should still be denied because a jury could find that private browsing data is identifying. The Google
 22

23 ¹ Google’s cases are inapposite. Mot. at 10. *I.C. v. Zynga, Inc.* involved an accidental data breach of
 24 non-private data, rather than a breach of a contractual promise not to collect private data. 2022 WL
 2252636, at *7 (N.D. Cal. Apr. 29, 2022) (Gonzalez, Rogers, J.). *Cahen v. Toyota Motor* concerned
 25 the “aggregate collection and storage of non-individually identifiable driving history,” and unlike
 26 here (where Google’s own employees have admitted that the data is identifying), there were “no
 27 specific allegations as to why this data is sensitive or individually identifiable.” 717 F. App’x 720,
 28 724 (9th Cir. 2017). The other cases are further afield. In *Low v. LinkedIn Corp.*, the plaintiff alleged
 29 that LinkedIn disclosed his browsing history to third parties, and yet he failed to even “articulate . . .
 what information had actually been transmitted to third parties [and] how it had been transferred.”
 2011 WL 5509848, at *3 (N.D. Cal. Nov. 11, 2011).

1 Privacy Policy throughout the class period defined “personal information” to include “data that *can*
 2 be reasonably linked to” an individual. PAF23. Google employees admit that private browsing data
 3 is identifying, triggering (at a minimum) a disputed issue of fact. For example (PAF24):

- 4 • The “guarantees” that “Google doesn’t collect personal information while in private
 mode . . . *aren’t true.*”
- 5 • “Incognito mode . . . *does not provide anonymity/invisibility towards . . . Google.*”
- 6 • “[T]he idea that users [are] not identifiable if one were to use all of the data we have
 available *is laughable.*”
- 7 • Any notion of “unlinkability” is “clearly *impossible and provably does not work.*”

8 Plaintiffs’ expert Jonathan Hochman also analyzed data produced in this case and explained
 9 how it is keyed to unique identifiers that are identifying. PAF25. And through sanctions, Plaintiffs
 10 found evidence that Google stores private browsing data *alongside* regular browsing data that
 11 Google deems “authenticated.” PAF4. This practice alone undermines Google’s assertion that it uses
 12 “technical safeguards preventing [] linking,” and in itself defeats Google’s Motion. Mot. at 9.

13 Finally, yet another basis for standing, which Google barely addresses, is Plaintiffs’ “stake”
 14 in Google’s “unjustly earned profits.” *Facebook Tracking*, 956 F.3d at 600.² This Court has already
 15 rejected Google’s damages *Daubert* motion in full, paving the way for a jury to find that Google
 16 was unjustly enriched by billions from the practices at issue in this case. Dkt. 803.

17 **B. Triable Issues as to the Contract Claim and Google’s Express Consent Defense.**

18 Google incorrectly states that Plaintiffs must prove their “lack of consent” for their CIPA,
 19 CDAFA, and intrusion upon seclusion claims. Mot. at 10. For those claims, express “consent is a
 20 *defense*,” as Google previously admitted (Dkt. 82 at 4),³ and “it is *Google’s burden* to prove
 21 consent.” *Calhoun v. Google*, 526 F. Supp. 3d 605, 620 (N.D. Cal. 2021); Dkt. 113 at 14.

22 Google cannot meet its summary judgment burden to prove that “no reasonable jury could
 23 find” for Plaintiffs. *Calhoun*, 2022 WL 18107184, at *7. To establish express consent, Google must

25
 26 ² The lack of a certified Rule 23(b)(3) damages class makes no difference. Mot. at 9 n.7. The named
 27 Plaintiffs are seeking damages, and so too may other class members in their individual capacities.
 28 Regardless, everyone also seeks injunctive relief to foreclose Google’s future unjust enrichment.

³ See also *Calhoun*, 2022 WL 18107184, at *8 (“consent is a *defense* to . . . CIPA [and] intrusion
 upon seclusion”).

1 prove that it “explicitly notif[ied]” users of the “specific practice[s]” that Plaintiffs challenge—
 2 Google’s collection, tracking, and use of private browsing information. *In re Google RTB Consumer*
 3 *Priv. Litig.*, 606 F. Supp. 3d 935, 949 (N.D. Cal. 2022) (Gonzalez Rogers, J.); *Campbell v. Facebook*,
 4 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014). A reasonable jury could readily find that Google did not
 5 disclose these specific practices, particularly where (1) the Court has rejected Google’s express
 6 consent arguments, based on the same contract documents, (2) Plaintiffs uncovered key Google
 7 admissions supporting their interpretation, and (3) Google has been sanctioned for concealing how
 8 it tracks, stores, and uses the data.

9 1. Law of the case undermines Google’s express consent defense.

10 In its first motion to dismiss, Google primarily argued that the Privacy Policy discloses that
 11 Google collects and uses private browsing data, an argument Google repeats in the current Motion:

12 Google’s Initial Motion to Dismiss	13 Google’s Motion for Summary Judgment
13 Google’s Privacy Policy—to which Plaintiffs 14 consented when they signed up for their 15 Google accounts—explains that Google 16 receives exactly this Data. Dkt. 82 at 2.	14 Plaintiffs consented to Google’s Privacy 15 Policy—which expressly disclosed the 16 challenged data collection and use. Mot. at 1.

17 The Court assessed the specific Privacy Policy provision Google identified (and that Google
 18 relies on again now), and the Court ruled that “[t]his general [data collection] disclosure never
 19 mentions private browsing. Nor does it explain that Google collects this data from users in private
 20 browsing mode.” Dkt. 113 at 16. **“Google did not notify users that Google engages in the alleged**
 21 ***data collection while the user is in private browsing mode,*** and therefore “Google cannot show
 22 that Plaintiffs expressly consented.” *Id.* at 20. Plaintiffs then added their contract claim, and Google
 23 filed another motion to dismiss, contending (as it does now) that even if Google failed to disclose
 24 its collection and use of private browsing data, it nowhere made a contractual promise not to collect
 25 and use the data. Google’s current argument repeats that prior one nearly verbatim.

24 Google’s Second Motion to Dismiss	25 Google’s Motion for Summary Judgment
25 Nowhere in the documents that Plaintiffs claim 26 comprise their contract did Google make the 27 promise it allegedly breached—namely, that 28 “Google would not collect and use private 29 browsing data.” Dkt. 164 at 1.	26 None of the documents Plaintiffs claim 27 comprise their contract contains the purported 28 “promis[e] that ‘private browsing mode’ would 29 prevent Google from collecting users’ data.” Mot. at 12.

1 The Court rejected Google’s argument again, holding that “a reasonable user, reading Google’s
 2 contract with Plaintiffs as a whole, ***could easily conclude that Google promised Plaintiffs that using***
 3 ***‘private browsing mode’ would prevent Google from collecting Plaintiffs’ data.***” Dkt. 363 at 21.

4 These prior rulings are law of the case. “Under the law of the case doctrine, a court is
 5 generally precluded from reconsidering an issue that has already been decided by the same court, or
 6 a higher court in the identical case.” *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).
 7 Here, the same court has already held that a reasonable user could interpret the form contract to
 8 mean that Google would not collect and use private browsing data. Google has not identified any
 9 new factual issues relevant to interpreting the contract, nor could Google. As this Court cautioned:
 10 “If you take a position at summary judgment that a term is unambiguous such that the Court can
 11 decide it as a matter of law, ***you will be excluded at trial from offering extrinsic evidence to***
 12 ***interpret that claim.***” Feb. 14, 2023 Tr. 39:14–18. Google is limited to the contract documents, just
 13 as it was on the motions to dismiss when it lost on the same issue.

14 Google relies heavily on *Calhoun*, which is not “controlling” and therefore irrelevant for law
 15 of the case.⁴ 2022 WL 18107184. More importantly, this Court has explained why *Calhoun* is
 16 distinguishable: ***“the absolute critical difference, is that here they were incognito mode, there they***
 17 ***were not.”*** Feb. 14, 2023 Tr. 8:12–14. Google cannot prove express consent for collecting ***signed***
 18 ***out, private*** browsing data through a case that addressed ***signed-in, regular*** browsing data. SUF9.

19 Google’s reliance on *Calhoun* overlooks the well-settled principle that consent is “not an all-
 20 or-nothing proposition.”” *In re Google Inc.*, 2013 WL 5423918, at *12 (N.D. Cal. Sept. 26, 2013).
 21 Rather, “a party may consent to the interception of . . . only a subset of its communications.” *In re*
 22 *Pharmatrak, Inc.*, 329 F.3d 9, 19 (1st Cir. 2003). While Google might disclose that it collects data
 23 from regular browsing users, Google is “making privacy worse by collecting Incognito when the
 24 user has clearly told Chrome that it wants to be private.” PAF20. Google used private browsing as

25
 26 ⁴ New cases must be “controlling” to trigger the exception to law of the case. *Old Person v. Brown*,
 27 312 F.3d 1036, 1039 (9th Cir. 2002). The only other case Google cites is the unpublished decision in
 28 *Smith v. Facebook, Inc.*, which Google already relied on at the pleadings stage. Mot. at 12; Dkt. 82
 at 10; 745 F. App’x 8 (9th Cir. 2018). In *Smith*, the collected data was not flagged as sensitive by
 Facebook, and the “practice complained of” was disclosed in the contract. *Id.* at 9.

1 a Trojan horse, enticing users to give up their data with false promises like “no one sees anything
 2 about you,” while tagging the data as “private” and using that private data to feed its advertising
 3 algorithms—practices not at issue in *Calhoun*. PAF4, 7, 27.

4 2. The evidence otherwise creates triable issues as to express consent.

5 Even if the Court is inclined to revisit the prior rulings, it should still deny summary judgment
 6 because Google cannot prove “the absence of a genuine issue of material fact regarding [Plaintiffs’]
 7 consent to the interception[s].” *Zaratzian v. Abadir*, 2014 WL 4467919, at *9 (S.D.N.Y. Sept. 2,
 8 2014) (denying summary judgment on wiretap claim). Similarly, where a contract is “susceptible to
 9 more than one reasonable interpretation, summary judgment is ordinarily improper.” *Pardi v. Kaiser*
 10 *Permanente Hosps.*, 389 F.3d 840, 849 (9th Cir. 2004) (vacating summary judgment on contract
 11 claim). The Google form contract is susceptible to Plaintiffs’ interpretation (at a minimum),
 12 including because “any ambiguity . . . will be interpreted against the drafter.” 11 Williston on
 13 Contracts § 32:12; *see Baldwin v. Cont'l Cas. Co.*, 2004 WL 2254938, at *6 (N.D. Cal. Oct. 5, 2004)
 14 (invoking *contra proferentum* to deny summary judgment on contract claim).

15 a. *Incognito Splash Screen*

16 The Court should (again) reject Google’s argument that the Splash Screen is not part of the
 17 contract. Mot. at 16. As before, “[a] reasonable user could read Google’s contract with Plaintiffs as
 18 incorporating the Incognito Splash Screen.” Dkt. 363 at 14. The “contract need not recite that it
 19 ‘incorporates’ another document, so long as it ‘guide[s] the reader to the incorporated document.’”
 20 *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997). Here, the Chrome Privacy Notice
 21 (which Google concedes is part of the contract (Mot. at 13)) has throughout the class period invited
 22 users to “us[e] incognito mode,” thus “guid[ing] the reader” to the Splash Screen. SUF23; *Facebook*
 23 *Tracking*, 956 F.3d at 610. Similarly, the Privacy Policy (also indisputably part of the contract) has
 24 since May 2018 invited users to “choose to browse the web privately using Chrome in Incognito
 25 mode.” PAF3. Google makes it impossible to use Incognito without viewing the Splash Screen;
 26 consequently, inviting Plaintiffs to use Incognito necessarily “direct[s] them to the Splash Screen,
 27 which “is enough” for incorporation. *Marchand v. Northrop Grumman*, 2017 WL 2633132, at *5
 28 (N.D. Cal. Jun 19, 2017) (document incorporated although contract referred to it by the wrong

1 name).⁵ But even if the Splash Screen is not incorporated, it is relevant to interpreting the contract.
 2 To decide whether a provision is ambiguous, courts “consider not only the face of the contract but
 3 also any extrinsic evidence that supports a reasonable interpretation.” *Travelers Indem. Co. of Conn.*
 4 *v. Premier Organics*, 2017 WL 4355043, at *2 (N.D. Cal. Sept. 29, 2017) (Gonzalez Rogers, J.).

5 Numerous parts of the Splash Screen undermine Google’s argument that the contract clearly
 6 disclosed its collection and use of private browsing data. For example, “[b]ased on the omission of
 7 Google from the list of entities that can see a user’s activity, a user might have reasonably concluded
 8 that Google would not see his or her activity.” Dkt. 113 at 17. In an effort to not be misleading,
 9 ***Google employees even advocated to add “Google” to the Splash Screen to show that “You are***
 10 ***NOT protected from Google.*** PAF21. Google decided against doing so. Yet now, rather than defend
 11 the actual Splash Screen, Google’s Motion rewrites it. The red words in this statement (taken from
 12 Google’s Motion (at 6)) are not on the actual Splash Screen: “The [Splash] Screen also makes clear
 13 . . . ‘your activity may still be visible to’ **entities online, including** websites, employers, and ISPs.”
 14 Putting aside Google’s temerity, Google’s sleight-of-hand only underscores the problem by
 15 conceding the actual text is defective.

16 Google’s reliance on the Amir survey (Mot. at 14) is improper under the Court’s directive
 17 that a party who argues a disclosure is unambiguous may not offer extrinsic evidence. Regardless,
 18 the surveys at best create a triable issue of fact. Plaintiffs will demonstrate that Amir admittedly did
 19 not ask users about “consent” (SUF85), and that he failed to survey the “specific practice” challenged
 20 here (namely, Google’s collection of private browsing data from users visiting ***non-Google*** websites
 21 while ***signed out*** of Google). Correcting Amir’s errors, Plaintiffs’ expert Mark Keegan found that

22
 23
 24 ⁵ Google’s cases are distinguishable. The problem in *Facebook Tracking* was that the plaintiffs sought
 25 to incorporate a *subsequent* version of the document that was incorporated into the contract. See 956
 26 F.3d at 610. In *Amtower v. Photon Dynamics, Inc.*, the court rejected the defendant’s argument that
 27 the parties’ contract incorporated an entirely “separate contract that plaintiff did not solicit and to
 28 which he was not a party.” 158 Cal. App. 4th 1582, 1609 (2008). And *Rodriguez v. Google LLC*,
 suggested that the “mere fact of a hyperlink” is insufficient. 2021 WL 6621070, at *4 (N.D. Cal. Aug.
 18, 2021). Plaintiffs’ arguments here are based on more than a hyperlink, and instead calculated
 Google statements guiding users to use “private” browsing.

1 [REDACTED] of users believed that Google did not collect private browsing data or that Google had no
 2 consent to collect that data. SUF85. Google falsely summarizes Keegan (again).⁶

3 Google's express consent defense is also undermined by the Splash Screen's representation
 4 that "Now you can browse privately, and other people who use this device won't see your activity."
 5 According to Google, this sentence "clarifies that Incognito mode is about privacy from other users
 6 of the same device, not privacy from Google." Dkt. 113 at 18. But "a reasonable user could have
 7 read this sentence to state that Incognito mode provided privacy from Google [now you can browse
 8 privately] **and** privacy from other people who use the same device." Dkt. 113 at 18. They are not
 9 mutually exclusive. Google employees proposed removing this phrase from the Screen because "**the**
 10 **word 'private'**" poses "**the risk of overestimating the protection Incognito offers**," where Google
 11 internally defines "privacy" to include "what you store or don't store **with Google**." PAF13, 16.
 12 Employees likewise lamented "**the deep-seated and challenging misconception around not**
 13 **understanding that Incognito is about local privacy.**" PAF13. These admissions not only
 14 undermine Google's argument that it "makes clear" that Incognito is limited to "local" privacy, Mot.
 15 at 6, but indisputably create a genuine issue of material fact.

16 The Splash Screen also states that "Chrome won't save . . . your browsing history [or] cookies
 17 and site data." Translated using Google's dictionary, this means that Chrome will not "keep" user
 18 data about "the sites you interact with/the links you click" by "recording it to a storage location."
 19 PAF17. In fact, Chrome saves users' private browsing data "to a storage location": Google's server-
 20 side logs, which include [REDACTED] SUF47, 50, 59. Google tries to cabin its "Chrome
 21 won't save" promise to a storage location on the device, but nothing on the Splash Screen so limits
 22 it. Furthermore, "a user might reasonably associate Chrome with Google because Chrome is
 23 Google's browser." Dkt. 113 at 18. Discovery has proven that even Google's employees conflate
 24

25 ⁶ In opposing class certification, Google misrepresented the Keegan survey, suggesting that "only . . .
 26 [REDACTED] indicated a belief that they have not given consent," and ignoring the other categories
 27 of respondents, including those who did not even know about Google's collection of private browsing
 28 data ([REDACTED]) and those who only consented to that collection for their visits to Google websites
 ([REDACTED]). Dkt. 659-3 at 4. Google's Motion (at 14 n.13) likewise misrepresents the survey, again
 ignoring other categories of respondents whose answers support Plaintiffs.

the two, thinking (incorrectly) that Incognito means that “Google doesn’t store” browsing data. PAF18.

Google’s case law also supports Plaintiffs. The court in *Hammerling v. Google LLC* **agreed with the prior findings in this case**: “In [Brown,] Google had made express promises that it would not save particular data while users were in Incognito mode. *See, e.g.*, . . . (‘Chrome won’t save . . . [y]our browsing history [or] [c]ookies and site data.’).” 2022 WL 17365255, at *11 n.16 (N.D. Cal. Dec. 1, 2022). Similarly, in *Block v. eBay, Inc.*, the court explained that provisions with language like “you will not” or “we will” are enforceable. 747 F.3d 1135, 1139 (9th Cir. 2014). Plaintiffs here rely on similar provisions (*e.g.*, “Chrome won’t save”).

Finally, a reasonable jury could interpret the Incognito name and icon to mean that Google would not collect, save, or use private browsing information. Google employees admit that users’ *“misconceptions flow directly from the framing of the feature as ‘Incognito’ (or, for other browsers, ‘Private’),”* and that “people pay attention to the name ‘Incognito’ and the Spy Guy icon, and people draw incorrect conclusions from there.” PAF9.

b. Privacy Policy

The Google Privacy Policy (which Google concedes is part of the contract (Mot. at 13)) has since May 2018 “presented Incognito mode as a way that users can control the information that Google collects.” Dkt. 113 at 19:

- [A]cross our services, you can adjust your privacy settings to **control what we collect** and how your information is used.
- You can use our services in a variety of ways to manage your privacy. For example, . . . *[y]ou can [] choose to browse the web privately using Chrome in Incognito mode.*
- Our services include . . . [p]roducts that are integrated into third-party apps and sites

SUF20, PAF2, Broome Exs. 100-12. The Court already rejected Google's argument that no reasonable person could interpret these provisions as Plaintiffs do. *See* Dkt. 113 at 18, 29; Dkt. 363 at 21.

Discovery further undermines Google's efforts to prove that no jury could agree with Plaintiffs. Google employees admitted that the word "private" reinforces the "misperception that your

1 browsing is private everywhere instead of just on your device.” PAF19. *Employees even warned Mr.*
 2 *Pichai not to “use the word[] private . . . when describing benefits of Incognito mode”* because it
 3 “run[s] the risk of exacerbating *known misconceptions* about protections Incognito mode provides.”
 4 PAF19. Google’s user research confirmed there are “several common misconceptions about private
 5 mode, including that it . . . *hides browsing activity from Google.*” PAF7.

6 That the “Privacy Policy said nothing about Incognito or PBM until May 2018” (Mot. at 8)
 7 dooms Google’s express consent defense because it is Google’s burden to prove consent. A document
 8 that “said nothing” about private browsing could not have “explicitly notif[ied]” users that Google
 9 engages in the “specific practice” of collecting private browsing data. *RTB*, 606 F. Supp. 3d at 949;
 10 *Campbell*, 77 F. Supp. 3d at 848. Summary judgment is unwarranted where, as here, “a reasonable
 11 jury could find that [the] provisions do not explicitly address—and thus do not obtain knowing
 12 consent for [the practice].” *Opperman*, 205 F. Supp. 3d at 1074.⁷

13 Unable to find support in the contract, Google attempts to rewrite it. Google falsely states
 14 that the provisions Plaintiffs cite are “in an introductory paragraph” of the Privacy Policy. They are
 15 not. Mot. at 15, SUF20. But even if they were, they would still be enforceable because the Privacy
 16 Policy is contractual, as Google concedes.⁸ Google next argues that private browsing provides “*some*
 17 control.” Mot. at 16. But a jury could find that merely providing “*some*” unspecified control
 18 breached Google’s obligation to permit users to “control what we [i.e., Google] collect.”⁹

19

20 ⁷ Google’s Motion in passing (at 3) refers to “Account Holder Agreements” without identifying any
 21 provision from such an agreement, or even identifying which agreement(s) it has in mind. The
 22 Statement of Facts references just one such agreement, the New Account Creation Agreement, but
 23 that agreement does not mention private browsing. SUF8; Broome Ex. 85 ¶¶ 33–47. Instead, it links
 24 to the Privacy Policy, which is misleading for the reasons discussed in this section.

25 ⁸ By contrast in *Hammerling v. Google*, the plaintiffs did rely on the Privacy Policy’s introductory
 26 paragraph. 2022 WL 2812188, at *16 (N.D. Cal. July 18, 2022). *Hammerling* is further
 27 distinguishable because, unlike here, the claim was based on a failure-to-disclose theory, which meant
 28 that Google “lacked consent” but was insufficient to establish a breach of contract. *Id.* at *13.

⁹ Google’s cases are inapposite because the cited provisions did not mention the product at issue. See *Google Location Hist. Litig.*, 514 F. Supp. 3d 1147, 1160 (N.D. Cal. 2021) (plaintiffs claimed “they were misled about the effect of the Location History setting specifically,” but did not identify any provision addressing that setting); *Rodriguez*, 2021 WL 6621070, at *3 (plaintiffs claimed they were misled about the WAA button, but the provision identified did not specifically mention WAA).

1 Even Google's employees acknowledge that Google "must enter a *contract* with the user
 2 regarding what happens when they enter Incognito mode," where "*[k]ey promises*" include "*don't*
 3 *collect data from the Incognito session.*" PAF20. Those Google employees further recognized that
 4 Google did not "actually deliver[] on the promise of being private," where *Incognito is "not private*
 5 *in the ways that many users want, that is, as to Google.*" PAF20.

6 c. *Search & browse privately page*

7 The Search & browse privately page also undercuts Google's attempt to prove that no jury
 8 could find for Plaintiffs. This page is incorporated into the contract because the Privacy Policy (which
 9 Google concedes is part of the contract (Mot. at 13)) invites users to "search and browse privately,"
 10 and that language contains a hyperlink to the Search & browse privately page. PAF1. This Court
 11 should reject Google's efforts to run away from this document because Google has already
 12 "concede[d]" that it is part of the contract, and the Court relied on that concession. Dkt. 363 at 13. At
 13 a minimum, this page is relevant to interpreting the contract.

14 This page promised that users can "control" what Google collects by using private browsing
 15 mode: "You're in control of what information you share with Google when you search. *To browse*
 16 *the web privately, you can use private browsing . . .*" SUF42. That representation is not limited to
 17 just Incognito mode, and as this Court already ruled, "[a] reasonable user could read" that statement
 18 "as promising that 'private browsing mode' prevents Google from collecting users' browsing data."
 19 Dkt. 363 at 20. Discovery again supports Plaintiffs' interpretation. PAF7-21.

20 Google's claim that this page is the only document relevant to Class 2 (non-Chrome private
 21 browsing) is incorrect. Mot. at 17. The Privacy Policy currently references other private browsing
 22 modes. PAF2. Moreover, Google's representations about Incognito are relevant to how users would
 23 interpret Google's representations about private browsing more generally, as confirmed by Google
 24 employees. For example, the author of the "Incognito Problem" presentation confirmed at deposition
 25 that, when he wrote "Incognito confuses people," he was "referring to people more generally who
 26 use any private browsing mode." PAF8. While Google did not design non-Chrome private modes,
 27 Google can be held accountable for making commitments to its own accountholders about Google's
 28 collection of data when they use those private browsing modes. *Id.*

d. Chrome Privacy Notice

The Chrome Privacy Notice, which Google concedes is part of the contract (Mot. at 13), also supports Plaintiffs, representing throughout the class period:

You can limit the information Chrome stores on your system by using incognito mode or guest mode. In these modes, Chrome won't store certain information, such as: Basic browsing history information like URLs, cached page text, or IP addresses of pages linked from the websites you visit.

Chrome won't share existing cookies with sites you visit in incognito or guest mode. Sites may deposit new cookies on your system while you are in these modes, but they'll only be stored and transmitted until you close the last incognito or guest window.

SUF23. “A reasonable user could read this statement to mean that their browsing history and cookies and site data would not be saved by Chrome and [] a user might reasonably associate Chrome with Google because Chrome is Google’s browser.” Dkt. 363 at 22–23. Discovery supports Plaintiffs’ (and the Court’s) interpretation. *See supra* Section II.B.2(a).

Google argues (Mot. at 7) that a reasonable user would not associate Chrome with Google because the “Chrome Privacy Notice uses the term differently.” But as the Court explained last time, “[t]his argument ignores that, although ‘Google’ and ‘Chrome’ are not synonymous, Google has complete control over Chrome’s functionality and Google obtains internet users’ data by causing Chrome to send Google the data.” Dkt. 363 at 23. The Chrome Privacy Whitepaper that Google cites cuts in Plaintiffs’ favor because it repeats the Splash Screen’s incomplete list of entities that collect the data. *See* Mot. at 7-8; SUF26. Google also argues that its representations (in this and other contractual documents) are not “enforceable” because they “simply provide information about how Incognito works.” Mot. at 15. Google errs by mistakenly relying on cases addressing whether a document amounts to a contract in the first place. *See* Mot. at 15 (citing cases).¹⁰ Here, Plaintiffs’ claim is based on disclosures which Google concedes to be “contractual.” Mot. at 13.

¹⁰ Google cites *Rodriguez v. Google LLC*, where the plaintiffs (unsuccessfully) argued that a particular Google webpage constituted a *standalone* contract—separate and apart from the Google Privacy Policy. 2022 WL 214552, at *3 (N.D. Cal. Jan. 25, 2022). The same issue was presented in *Facebook Tracking*, where the court disagreed with the plaintiffs’ argument that a Facebook document constituted a standalone contract. See 956 F.3d at 610.

e. "Learn More" pages

Finally, Google cites the Splash Screen’s “Learn More” pages, but Google does not contend these pages are part of the contract, making them extrinsic evidence that Google may not rely on. Regardless, those pages support Plaintiffs’ interpretation. Like the Splash Screen, they “omit[] Google from the entities to which a user’s private browsing activity may be visible.” Dkt. 113 at 18; SUF35. The reference to “ads and resources on” websites does not inform users that Google will collect information about users’ activities on non-Google websites—and in fact implies the opposite because Google is not listed. SUF35. The more recent version of the “Learn More” page—“How Chrome Incognito keeps your browsing private”—fares even worse because it falsely promises that Chrome will not “tell . . . Google when you’re browsing privately,” which is violated through Google’s use of private browsing detection bits. SUF39; *infra* Section II.B.3. These documents at most raise a factual dispute regarding whether Google disclosed the conduct.¹¹

3. The sanctions orders undermine Google's express consent defense.

Having been sanctioned for concealing how it tracks, stores, and uses private browsing data, Google cannot prove as a matter of law that it “explicitly notif[ied]” users of these “specific practice[s].” *RTB*, 606 F. Supp. 3d at 949; *Campbell*, 77 F. Supp. 3d at 846, 848. In May 2022, Google was sanctioned for concealing three bits that were “specifically designed by Google to attempt to distinguish Chrome traffic from Incognito mode from traffic coming from non-Incognito mode,” making them “very clearly relevant to the issues in this litigation.” Dkt. 588-1 at 3, 26. In March 2023, Google was sanctioned again, including for concealing a fourth detection bit used for all of the private browsing modes at issue in both Class 1 and 2. Dkt. 898 at 18; *see also* PAF4.

Google previously denied engaging in these practices, including in open court:

- “[W]e don’t track people in private browsing mode.” 4/29/21 Tr. at 25:20-21:13.
- “Chrome doesn’t tell websites, including Google, when you’re browsing privately in Incognito mode.” SUF39.
- Users can browse “the web privately, with the *assurance that your choice to do so is private as well.*” PAF5.

¹¹ Contrary to Google’s assertion (at 12) this Court’s class certification order did not make findings about what “Learn More” page “makes clear.” Dkt. 803 at 31.

1 • “Chrome will remedy a loophole that has allowed sites to detect people who are browsing
 2 in Incognito Mode.” PAF5.

3 Meanwhile, Google designed private browsing detection bits that rely on information Google
 4 receives from the Chrome browser, and Google exploited the same detection loophole that it publicly
 5 criticized other websites for using. Dkt. 588-1 at 3–4; Dkt. 898 at 17; *see also* PAF4.

6 Google was also sanctioned for concealing (and is still concealing) how it stores and uses
 7 private browsing data. Following the October 2022 order to show cause, Google admitted that *it*
 8 *stores signed-out, private browsing data in the same logs as “authenticated” data* (signed-in data).
 9 Dkt. 797-3 at 10; PAF4. That revelation contradicts Google’s prior representations to the Court that
 10 “logs are *internally segregated* by whether you’re logged into a Google account or aren’t.” Apr. 29,
 11 2021 Tr. 16:16–20:2. Google’s efforts to detect private browsing, and the way it stores that data,
 12 only came to light through sanctions, and Google is still refusing to comply with its obligations. A
 13 jury could easily agree with Plaintiffs that Google lacked consent for these undisclosed practices.

14 Finally, the Court’s denial of 23(b)(3) certification does not warrant summary judgment.
 15 Mot. at 17. The damages sought by Plaintiffs (and any class members) are for past harm, and specific
 16 performance is available to remedy future harm. *See Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652,
 17 687 (N.D. Cal. 2021) (“damages [are] retrospective. An injunction is prospective.”); *Tamarind*
 18 *Lithography Workshop v. Sanders*, 143 Cal. App. 3d 571, 578 (1983) (damages properly awarded
 19 for past harm, and “an injunction” [i.e., specific performance] available to prevent future harm).¹²

20 **C. Triable Issues as to the Federal Wiretap Claim.**

21 1. The consent exception is inapplicable.

22 a. *Website consent is at most a triable issue.*

23 Google cannot meet its burden to prove as a matter of law that websites consented. Google
 24 made this exact argument in its motion to dismiss, relying on the same logic, and the Court disagreed.

25
 26 ¹² Contrary to Google’s misleading claim (at 17 n.14), the Complaint does seek specific performance.
 27 *See* FAC ¶ 276; Prayer for Relief (seeking “equitable relief” on breach of contract claim, which
 28 includes specific performance). Google’s reliance on *Lewis v. YouTube, LLC*, is misplaced. 244 Cal.
 29 App. 4th 118, 127 (2015); Mot. at 17 n.14. Unlike here, that plaintiff “failed to identify any provision
 30 of the Terms of Service that she seeks to have a court enforce.” *Id.* at 127.

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[W]ebsites chose to install Google's code to transmit the Data to Google. Accordingly, the websites necessarily consented to Google's receipt of the Data. Dkt. 82 at 13.	[T]he intended recipients of the alleged communications—websites that installed Google's code—consented to Google's receipt of the at-issue data. Indeed, the purpose of installing the code is to send the data to Google to obtain its services. Mot. at 17.

“[E]ven assuming that Google has established that websites generally consented to the interception of their communications with users, ***Google does not demonstrate that websites consented to, or even knew about, the interception of their communications with users who were in private browsing mode.***” Dkt. 113 at 22.

Since that ruling, Google has identified ***no evidence*** suggesting that even a single website knew about Google’s collection of private browsing data, let alone consented, which means Google cannot meet its summary judgment burden. To the contrary, a jury could readily conclude that websites did not consent, ***particularly because Google uniformly assured websites that Google would always comply with its own Privacy Policy*** (SUF92, PAF6), which, as discussed above, contains commitments to users about Google’s collection and use of private browsing data.¹³

b. *There is a triable issue as to the crime-tort exception to consent.*

Even if Google could prove that users or websites expressly consented (and it cannot), summary judgment would still be unwarranted because a jury could find that the crime-tort exception applies. Consent is not a defense where a “communication is intercepted for the purpose of committing any criminal or tortious act.” 18 U.S.C. § 2511(2)(d). “[S]ubsequent disclosure of the contents of the intercepted conversations for the alleged purpose of further invading the [Plaintiffs’] privacy” is a tortious act that satisfies this exception to consent. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 828 (N.D. Cal. 2016).

Here, where the Court has sanctioned Google for continuing to hide how it uses private browsing data, a jury could find that Google collected the data so that it could later tag that data with

¹³ Google’s reliance on *Rodriguez v. Google LLC*, is misplaced. 2021 WL 2026726, at *1 (N.D. Cal. May 21, 2021); Mot. at 17. That case suggested that app developer consent did not turn on “each user’s individual privacy expectations.” Here, Plaintiffs’ claims are based on a form contract, including the Privacy Policy, which Google also relies on to ground its consent defense.

1 detection bits, key it to unique identifiers, and create user profiles, all in (further) violation of state
 2 law, including CDAFA, CIPA, intrusion upon seclusion, and invasion of privacy SUF93, PAF4, 26-
 3 27; *see* Dkt. 113 at 20 (holding these allegations satisfied the crime-tort exception at the pleadings
 4 stage). Google argues that its purpose was not to “perpetuate torts” (Mot. at 17), but any “disputes as
 5 to [Google’s] intent under wiretapping statute” are “to be decided by the jury.” *Planned Parenthood*
 6 *v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 687 (N.D. Cal. 2019) (denying motion for summary
 7 judgment on Federal Wiretap claim, including based on the crime-tort exception).¹⁴ *In re Meta Pixel*
 8 *Healthcare Litigation*, which Google cites, supports Plaintiffs. *See* 2022 WL 17869218 at *13 (N.D.
 9 Cal. Dec. 22, 2022) (finding there was a “not-insignificant chance” the crime-tort exception applied
 10 based on allegations that mirror the evidence found here—that defendant “use[d] . . . data for
 11 advertising in the absence of express written consent”).¹⁵

12 2. The ordinary course of business exception is inapplicable.

13 The Court should (again) reject Google’s efforts to evade liability on the basis of the
 14 ordinary-course-of-business exception. Mot. at 18; *see* Dkt. 113 at 28 (rejecting this argument at the
 15 pleadings stage). This exception “is **narrow**” and applies “only where an electronic communication
 16 service provider’s interception facilitates the transmission of the **communication at issue** or is
 17 incidental to the transmission of such communication.” Dkt. 113 at 28. The “communication at
 18 issue” here is “the communication between the user’s computer **and the website.**” *Id.* A jury could
 19 find that this exception does not apply, including because Plaintiffs’ technical expert opines that
 20 user-website “communications flow back and forth between the user’s browser and the non-Google
 21 website’s server **irrespective of the Google tracking beacons.**” SUF61. Google cannot credibly
 22 claim (and indeed does not claim) that users would be unable to visit non-Google websites but for
 23

24 ¹⁴ “An illegal purpose does not have the be the “sole purpose” for the crime-tort exception to apply.
 25 *Planned Parenthood*, 402 F. Supp. 3d at 686.

26 ¹⁵ The other cases cited by Google are distinguishable because there were no allegations or evidence
 27 of culpable intent. *See e.g.*, *Sussman v. Am. Broadcasting Co., Inc.*, 186 F.3d 1200, 1203 (9th Cir.
 28 1999) (“no probative evidence”); *In re Google*, 2014 WL 1102660, at *18 n.13 (N.D. Cal. 2014)
 (“[In]othing” regarding tortious “motivation”); *see also Rodriguez*, 2021 WL 2026726, at *6 n.8
 (similar).

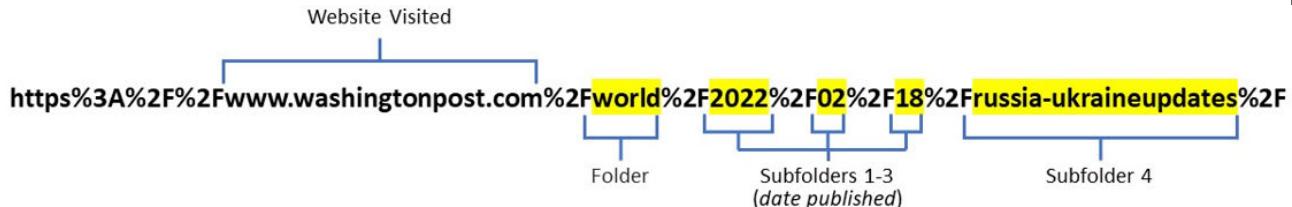
1 those Google tracking beacons. That includes the Google Analytics tracking beacons by which
 2 Google collects private browsing data from users' visits to over [REDACTED] of websites. SUF79.

3 Even if the evidence established that Google's interceptions were somehow "essential" for
 4 users to visit non-Google websites (Mot. at 19), a jury could still find that the ordinary-course
 5 exception does not apply for two reasons. *First*, there is evidence that Google uses the data for its
 6 own enrichment (and other still undisclosed purposes) separate and apart from any services it
 7 provides to websites, including to create profiles and develop Google products. PAF26-27. "The
 8 phrase 'in the ordinary course of business' cannot be expanded to mean anything that interests a
 9 company." *In re Google Inc.*, 2013 WL 5423918, at *9. Such an expansion is especially uncalled
 10 for here, where Google continues concealing how it uses the data. *Second*, the exception does not
 11 apply at this stage because a jury could find that Google violated its "own agreements and internal
 12 policies with regard to privacy," i.e, the Privacy Policy. *Id.* at *8. That trailable issue of fact
 13 undermines Google's hope to win summary judgment on this exception.

14 3. Google intercepted the "contents" of communications.

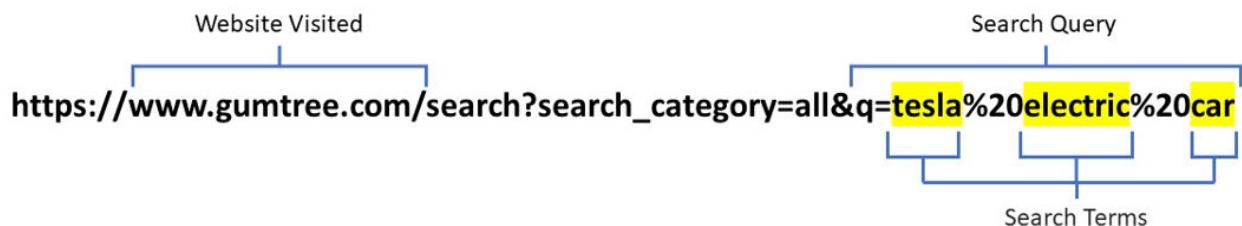
15 The Federal Wiretap Act "broadly defines 'content' as that which 'includes any information
 16 relating to the substance, purport, or meaning' of the communication at issue." *RTB*, 606 F. Supp.
 17 3d at 949; *United States v. Reed*, 575 F.3d 900, 916 n.11, 917 (9th Cir. 2009); 18 U.S.C. § 2510(8).
 18 A jury could find that the intercepted data qualifies as "content" because the data reveals the specific
 19 webpage being viewed, the portions of the page being viewed, and other minute user interactions,
 20 and also because of Google's private browsing detection bits, including [REDACTED]. PAF32-
 21 34. Google even publicly describes such information as "content." PAF32-34.

22 This information is conveyed through GET Request URLs (containing the full URL of the
 23 page the user is viewing) and Referer URLs (containing the URL of the referring page). PAF32-34.
 24 All the GET Request URLs Google intercepted from class members "include the folder, subfolder,
 25 and precise file requested from the webserver." PAF32-35. Below is an excerpt of one such example
 26 where a user accessed a page within the Washington Post website containing news on Ukraine:
 27
 28



PAF32-34. “A URL, unlike an IP address, identifies the particular document within a website that a person views and thus reveals much more information about the person’s [i]nternet activity.” *United States v. Forrester*, 512 F.3d 500, 510 n.6 (9th Cir. 2008); *RTB*, 606 F. Supp. 3d at 949 (URL and referer URL constitute content); *Meta Pixel*, 2022 WL 17869218, at *11 (URLs including the “path” are “content because they concern the substance of a communication”).

In addition, a jury could find that Google intercepted “contents” of communications because the intercepted URLs contain user-generated search terms.¹⁶ Below is an example of a Google-captured URL where a user searched for “tesla electric car”:



“If the user enters a search phrase . . . that search phrase would appear in the URL,” and disclosure of that URL “would reveal content.” *Forrester*, 512 F.3d at 510 n.6; *see also Hammerling*, 2022 WL 2812188, at *14 (“when they reproduce a person’s... queries, they are contents”); *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 806 F.3d 125, 137–38 (3d Cir. 2015) (“If . . . [a] URL is . . . part of the substantive information conveyed to the recipient, then by definition it is ‘content.’”). There is at least a triable issue where Google’s own expert acknowledges that URLs containing search terms constitute content. PAF32-34; *see In re Zynga Privacy Litigation*, 750 F.3d 1098, 1108–09 (9th Cir. 2014) (“a user’s request to a search engine for specific information could constitute . . . contents of a communication”); *see also Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1082 (C.D. Cal. 2021) (“URLs containing search terms constitute content”). Plaintiffs’ technical expert

¹⁶ These URLs also contain Google-appended Click IDs (“GCLIDs”), which tie user-generated search terms that led the user to that site. PAF32-34.

1 report also provides examples of these URLs—which include the path, folders, subfolders, search
 2 terms, GCLIDs, and other information showing the portion of the webpage being viewed—and
 3 demonstrates that Google intercepted this information from all named Plaintiffs. PAF32-34.

4 **D. Triable Issues as to the CIPA Claim.**

5 Aside from Google’s challenge to the “content” element, which should be rejected for the
 6 same reasons just discussed,¹⁷ Google raises just one argument on the CIPA claim (confidentiality),
 7 and the argument is limited to CIPA § 632 (Google otherwise ignores the § 631 claim). Mot. at 21.
 8 This confidentiality question also turns on a triable issue of fact.

9 CIPA defines a “confidential communication” as “any communication carried on in
 10 circumstances as may reasonably indicate that any party to the communication desires it to be
 11 confined to the parties thereto.” Cal. Penal Code § 632(c); *Flanagan v. Flanagan*, 27 Cal.4th 766,
 12 774 (2002). To establish the existence of a confidential communication with non-Google websites,
 13 Plaintiffs need only demonstrate a reasonable expectation that their communications were not being
 14 disseminated to an “**unannounced** second observer.” Dkt. 113 at 30 (quoting *Mirkarimi v. Nevada*
 15 *Prop. I LLC*, 2013 WL 3761530, at *2 (S.D. Cal. July 15, 2013)). Whether Plaintiffs knew those
 16 communications might be visible to ISPs, employers, or schools is legally irrelevant and does not
 17 give Google (or any **unannounced** observer) the right to intercept those communications.

18 The reasonableness of Plaintiffs’ expectation of confidentiality as to Google is a triable issue,
 19 which can be decided based on the form contract, Plaintiffs’ testimony,¹⁸ and Google’s employee
 20 admissions, including that “many people” within Google favored revising the Splash Screen to add
 21 “Google” to the list of entities that can view private browsing activity. PAF21. See *Safari Club Int’l*
 22 *v. Rudolph*, 862 F.3d 1113, 1126 (9th Cir. 2017) (“whether a communication is confidential is a
 23 question of fact normally left to the fact finder”); *Brinkley v. Monterey Fin. Servs., LLC*, 2020 WL
 24
 25

26 ¹⁷ See *RTB*, 606 F. Supp. 3d at 949 (applying same standard for CIPA and federal Wiretap Act).

27 ¹⁸ For example, discussing the Splash Screen, Plaintiff Byatt testified: “it doesn’t say Google here. It
 28 doesn’t say my activity might still be visible to Google . . . and that would have been a great place
 for Google to put Google. So I understood . . . my information not being visible to Google.” PAF14.

1 12991079, at *7 (S.D. Cal. Jan. 17, 2020) (whether communications were “confidential” raised
 2 factual dispute precluding summary judgment).¹⁹

3 **E. Triable Issues as to the CDAFA Claim.**

4 Contrary to Google’s assertion (at 22), there is evidence that Google “access[ed]” Plaintiffs’
 5 computers, including written discovery admissions. The CDAFA defines “access” as, *inter alia*, to
 6 “instruct [or] cause output from [or] communicate with . . . a computer.” Cal. Penal Code
 7 § 502(b)(1). And Google admits that its code “**instructs** the user’s browser” to send data to Google.

8 **SUF61.** *Meta Platforms, Inc. v. BrandTotal*, which Google cites, illustrates the difference between
 9 passively receiving data and what Google is doing here. 605 F. Supp. 3d 1218 (N.D. Cal. 2022). In
 10 *BrandTotal*, the defendant received the data from non-parties (Facebook users) after the plaintiff
 11 (Facebook) already “sent [the data] to th[ose] users.” *Id.* at 1260. Here, Google concedes that its
 12 code “directs the browsers of users” to send the data to Google. Mot. at 22; SUF71 (Google is
 13 “caus[ing] users’ browser” to send the data).²⁰ Plaintiffs’ position does not “criminalize routine

14 internet functionality.” Mot. at 22. “What makes [Google’s] access unlawful is that [Google is]
 15 *without permission*” collecting the data. *United States v. Christensen*, 828 F.3d 763, 789 (9th Cir.
 16 2015). Google’s own employees discussed how Google was collecting this data “without consent,”
 17 and so a jury could agree that Google lacked permission to collect private browsing data.

18 A jury could also find that Google’s conduct caused Plaintiffs to suffer “damages or loss”
 19 under the CDAFA. To meet that requirement, Plaintiffs can rely on the value of the misappropriated
 20 data and the defendant’s unjust enrichment from its use of that data. *See Facebook Tracking*, 956
 21 F.3d at 600 (reversing dismissal of CDAFA claim, finding requisite damages based on a “study that

22
 19 Google’s Motion includes only one case not previously cited in its Motion to Dismiss: *Rodriguez*,
 23 2021 WL 2026726, at *7. Mot. at 21. *Rodriguez* was decided on a motion to dismiss on distinct
 24 factual allegations, and this case involves evidence supporting Plaintiffs’ contentions. As for the
 25 other cases, the Court already distinguished those cases in its Order Denying Google’s Motion to
 26 Dismiss. *See* Dkt. 82 at 14–15; Dkt. 113 at 32 & n.5. For example, unlike in *Campbell*, 77 F. Supp.
 27 3d at 849, “the instant case does not involve messages going to another person, who could share the
 28 communication with others.” Dkt. 113 at 21.

20 Google’s other case is distinguishable for the same reason. *See New Show Studios LLC v. Needle*,
 21 2014 WL 2988271, at *6 (N.D. Cal. June 30, 2014) (complaint “devoid of any allegation that the
 22 defendants accessed *any computer*”).

1 values users’ browser histories at \$52 per year” and users’ “legal interest in unjustly earned profits”
 2 from defendant’s use of the data). Plaintiffs have uncovered evidence that there is a market for their
 3 data, and that Google itself paid users for data (including in private mode); PAF28 (paying users
 4 \$3.00 per month for their browsing data). Google intercepted the data without paying for it, and it
 5 was thus unjustly enriched. PAF27-28.²¹ Google cites four decisions, but those were only motions
 6 on the pleadings, where the plaintiffs had not sufficiently pled any eligible CDAFA damages.²²

7 **F. Triable Issues as to Invasion of Privacy and Intrusion Upon Seclusion.**

8 Google’s argument that users have no reasonable expectation of privacy in their “private” data
 9 at best turns on a disputed factual question that cannot be resolved at summary judgment. These
 10 claims are governed by an objective standard, and there is a “material factual dispute as to whether
 11 [Google’s disclosures] obtained effective consent” to its collection and use of private browsing data,
 12 particularly where employees stressed the need to “expand Incognito more to also offer some privacy
 13 towards Google.” PAF21; *Opperman*, 205 F. Supp. 3d at 1073 (denying summary judgment on
 14 intrusion claim).

15 Google’s argument that Plaintiffs must prove that the data is “identified” (Mot. at 23) has been
 16 soundly rejected. The “critical fact” for these claims is “that the online entity represented to the
 17 plaintiffs that their information would not be collected, but then proceeded to collect it anyway.”
 18 *Facebook Tracking*, 956 F.3d at 603; *Referrer Header*, 465 F. Supp. 3d at 1009 (*Facebook Tracking*
 19 “did not rest its decision [] on the particular type of data at issue”). Even cases that Google cites are
 20 in accord. *See Wesch v. Yodlee, Inc.*, 2021 WL 1399291, *3 (N.D. Cal. Feb. 16, 2021) (users “have a
 21 reasonable expectation of privacy” where, as here, the defendant “improperly accessed and retained”

22²¹ Google’s tracking beacons also “take up processing, storage, and power/battery resources on user
 23 devices” and “cause webpages to load slower” (PAF30), which also constitute “damages or loss.” *In*
 24 *re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1066–67 (N.D. Cal. 2015).

25²² *Cottle v. Plaid Inc.*, 536 F. Supp. 3d 461, 488 (N.D. Cal. 2021) (dismissing for failure to support
 26 damages theory); *Nowak v. Zapo, Inc.*, 2020 WL 6822888, at **4–5 (N.D. Cal. Nov. 20, 2020) (loss
 27 of bitcoin outside scope of CDAFA); *Williams v. Facebook, Inc.*, 384 F. Supp. 3d 1043, 1050 (N.D.
 28 Cal. 2018) (dismissing for failure to allege harm). In contrast, Google’s own documents prove that
 Google was unjustly enriched from its collection and use of the data. PAF27-28; *see also Facebook*
Tracking, 956 F.3d at 600. The Court has relatedly denied Google’s *Daubert* motion as to Plaintiffs’
 damages models, which covered both actual damages and unjust enrichment damages. Dkt. 803.

1 users' information); *Hart v. TWC Prod. & Tech., LLC*, 526 F. Supp. 3d 592, 600 (N.D. Cal. 2021)
 2 (reasonable expectation of privacy where an "innocuous-seeming" application (here, browsers)
 3 surreptitiously gained access to conduct "surveillance" without consent). Google's other cases,
 4 focusing on Fourth Amendment unlawful-search issues, are inapposite.²³ In any event, even if
 5 Plaintiffs were required to prove the data is identified (and they are not) that would still be a triable
 6 issue of fact, particularly where Google's employees admit that "**we would never say] that Google**
 7 **doesn't know who you are while you're Incognito.**" PAF27; *supra* Section II.A..

8 Whether Google's conduct is highly offensive (Mot. at 23) is also triable issue, to be decided
 9 based on "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion
 10 as well as the intruder's motives and objectives, the setting into which he intrudes, and the
 11 expectations of those whose privacy is invaded." *Treviller v. Goldstein*, 2019 WL 1454171, *6 (N.D.
 12 Cal. April 2, 2019) (Gonzales Rogers, J.). Deceit is a "plus" factor in assessing offensiveness, *In re*
 13 *Google Location History Litig.*, 514 F. Supp. 3d 1147, 1157 (N.D. Cal. 2021), and Plaintiffs have
 14 evidence that **Google knew it was "deceiving] users"** by collecting their private browsing data in
 15 their most vulnerable moments, where employees described Incognito as "**bad for users, bad for**
 16 **human rights, bad for democracy.**" PAF12.²⁴ Google points out that Plaintiffs continued to use
 17 private browsing after filing the lawsuit, but that assertion is misleading. Mot. at 23. Plaintiffs did so
 18 to obtain discovery regarding how Google stores the data through the Special Master process, which
 19 was limited to the Named Plaintiffs' data. SUF105. Moreover, as Google's employees concede, there

20

21 ²³ *Forrester*, 512 F.3d at 510-11 (rejecting criminal defendant's Fourth Amendment challenge to
 22 government's monitoring of emails); *Sanchez v. Los Angeles Dep't of Transportation*, 2021 WL
 23 1220690, at *1, *5 (C.D. Cal. Feb. 23, 2021) (dismissing Fourth Amendment claim for unlawful
 24 search in a case about city's collection of data on motorized scooter usage because it is "self-evident
 25 that understanding where scooters tend to transit and park would help the City determine how and
 26 where to adjust the rules of the road"). The other cases are further afield. See *Hammerling*, 2022 WL
 27 2812188 at *13 (dismissing claims where "Plaintiffs do not plausibly allege the specific apps from
 28 which" the defendant collected sensitive information); *Moreno v. San Francisco Bay Area Rapid
 Transit District*, 2017 WL 6387764, at *8 (N.D. Cal. Dec. 14, 2017) (dismissing claim where plaintiff
 was "on notice that [the defendant] would be accessing the information").

²⁴ See *McDonald v. Kiloo ApS*, 395 F. Supp. 3d 1022, 1032 (N.D. Cal. 2019) (surreptitious collection
 of data, and use of that data beyond what is disclosed and consented to, has more than "an
 insubstantial impact on privacy interests").

1 is no way to prevent Google from collecting the at-issue browsing information, so any efforts to avoid
 2 it are futile. SUF79, 106.

3 **G. Triable Issues as to the UCL Claim.**

4 1. Plaintiffs have UCL standing.

5 The evidence found in discovery supports the allegations the Court already deemed sufficient
 6 for UCL standing. Dkt. 363 at 24-29; PAF27-28. Google's Motion relies entirely on the same
 7 arguments that were wholly rejected. Dkts. 164, 363. Those decisions are law of the case, and that
 8 law is correct because there are "innumerable ways in which economic injury from unfair competition
 9 may be shown." Dkt. 363 at 25, 27 (quoting *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 324
 10 (2011)). This includes where there is a "cash value" for data and "an active market for data"—
 11 established by Google's Screenwise project. Dkt. 363 at 25; PAF28.

12 The evidence at a minimum creates a triable issue regarding both theories of harm: (1) that
 13 Plaintiffs "would have demanded payment for their data" but Google instead "caused Plaintiffs to
 14 acquire in a transaction less than they otherwise would have" and (2) that there are payors (including
 15 Google, such as during Screenwise) "willing to pay individuals for data" where Plaintiffs could
 16 "decide to sell their data at some point." *Id.* at 26; PAF28; *see also In re Carrier IQ, Inc.*, 78 F. Supp.
 17 3d at 1112-15 (UCL standing where company failed to disclose that its software was gathering
 18 information through surreptitious means). Plaintiffs' standing is neither new nor novel. *See* Dkt. 363
 19 at 26-27 (citing *Calhoun*, *In re Marriott*, *In re Yahoo!*, and *In re Anthem* decisions).²⁵ Plaintiffs also
 20 have a property interest in their data with the passage of the California Consumer Privacy Act, which
 21 affords them the right to exclude Google from selling their data (including browsing data) to third
 22 parties. Cal. Civ. Code §§ 1798.120(a), 1798.125(a), 1789.140(v)(1)(F).

23
 24
 25
 26 ²⁵ Other courts have followed this growing trend. *See, e.g., Klein v. Facebook, Inc.*, 580 F. Supp. 3d
 27 743, 803 (N.D. Cal. 2022) (personal information is property for UCL standing); *Griffey v. Magellan*
 28 *Health Inc.*, 2022 WL 1811165, *10 (D. Az. June 2, 2022) (same); *Callahan v. PeopleConnect, Inc.*,
 2021 WL 5050079, *19 (N.D. Cal. Nov. 1, 2021) (same).

2. Retrospective money damages are not an adequate remedy.

Google’s “adequate remedy at law” argument is surprising, yet meritless. Mot. at 25. Google previously argued that Plaintiffs’ UCL claim “should be limited to injunctive relief only.” Dkt. 164 at 23-24. Google now seeks summary judgment on the basis that Plaintiffs individually seek the legal remedies Google claimed were unavailable. *Id.* Regardless, injunctive relief is available. Google continues to collect, store, and use private browsing data, and Google will continue its unauthorized conduct absent an injunction. Monetary damages would only address Google’s *past* conduct while injunctive relief addresses Google’s ongoing conduct, such as Google’s use and offer of services that were developed or improved with private browsing data, and Google’s continued use of private browsing data to further develop and make changes to Google services. PAF27. Such injunctive relief is proper and warranted under the UCL. *WellPet*, 526 F. Supp. 3d at 687 (past money damages not an adequate remedy for prospective harm).²⁶ The cases Google cites turned on the plaintiffs’ failure to explain why remedies at law were inadequate. *See, e.g., Clark v. Am. Honda Motor Co., Inc.*, 528 F. Supp. 3d 1108, 1121 (C.D. Cal. 2021) (dismissing with leave to amend). Here, Google cannot demonstrate that Plaintiffs have an adequate remedy at law.

III. CONCLUSION

Plaintiffs ask the Court to deny Google's motion for summary judgment in its entirety.

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Respectfully submitted,

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²⁶ See also *Ghazarian v. Magellan Health, Inc.*, 53 Cal. App. 5th 171, 194 (2020) (money damages resolve past harms and injunctive relief protects against future harm); *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 955 (2017) (UCL injunctive relief is designed to prevent “future harm”).

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